

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





76-21588

ORIGINAL

To be argued by  
MARK C. RUTZICK

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

HENRY O. BOYD, SR.

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent,  
Auburn Correctional Facility,

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE  
UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Docket No. 76-2158

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HENRY O. BOYD, SR.

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent,  
Auburn Correctional Facility,

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ON APPEAL FROM AN ORDER OF THE  
UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF NEW YORK

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BRIEF FOR APPELLEE

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Preliminary Statement

This is an appeal from an order of the United  
States District Court for the Eastern District of New York  
(the late Hon. Walter Bruchhausen, Senior U.S.D.J.) dated



July 23, 1976 dismissing the petition for a writ of habeas corpus. The memorandum decision of Judge Bruchhausen is unreported.

Questions Presented

1. Are the findings of a state court judge at a Wade hearing that pre-trial confrontations were not impermissibly suggestive entitled to the presumption of correctness conferred by 28 U.S.C. § 2254(d)?

2. Were either of the pre-trial confrontations in this case so impermissibly suggestive as to deny petitioner due process of law at his trial, in view of the sound independent basis for each witness' identification of him?

3. Did petitioner have a right to counsel at a confrontation which occurred before the petitioner was formally charged with the offenses for which the identification was sought, when at the time of the confrontation petitioner was appearing for arraignment or unrelated charges?



### Statement of the Case

The conviction of the petitioner-appellant (hereafter "petitioner") arose from his participation in an armed robbery of the home of Fredricka Riordan at 43 Joralemon Street, Brooklyn, on June 23, 1971. Present during the robbery were Mrs. Riordan and her domestic employee, Mary Arrington. This petition challenges the pre-trial identification of petitioner as one of the perpetrators by both Mrs. Riordan and Mrs. Arrington. The District Court dismissed the petition.\*

Mrs. Riordan's initial identification of petitioner as one of the robbers occurred at a confrontation at the Kings County Criminal Court Building at 120 Schermerhorn Street, Brooklyn on August 10, 1971. That confrontation

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\* It must be noted at the outset that nowhere in this proceeding has the petitioner ever claimed that he was innocent of the charges for which he was convicted. He focuses exclusively on the identification procedures employed by the police and prosecutor, as if the State had been accused of some wrongdoing. Surely the guilt or innocence of the petitioner should not be entirely irrelevant to the outcome of this proceeding. See Schneckloth v. Bustamonte, 412 U.S. 218, 250, 264-275 (1973) (Powell, J., concurring); Ralls v. Manson, 503 F. 2d 491, 494 (2d Cir. 1974) (Lumbard, J., concurring); Friendly, Is Innocence Irrelevant? Collateral attacks on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970).



was the subject of a "Wade" hearing held in the Supreme Court, Kings County on March 7-8, 1972 (Abrams, J.). The only pre-trial identification of petitioner by Mrs. Arrington occurred at the Wade hearing.

#### The Crime

On June 23, 1971, Mrs. Riordan was at her home at 43 Joralemon Street, Brooklyn. At about three o'clock in the afternoon, she answered her doorbell and was asked by petitioner if "Sam" lived there. When she responded in the negative, petitioner inquired whether her husband was home. After she again said "no", Mrs. Riordan attempted to close the door, but petitioner displayed a small silver automatic weapon and forced the door open, pinning her against the wall (H. 2-4).<sup>\*</sup> As Mrs. Arrington, the cleaning woman, came to the door, she had a good look at petitioner, who entered the premises and was followed inside by another man (H. 46-47).

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\* "H" refers to minutes of "Wade" hearing, dated March 7-8, 1972, which are before the Court as Appendix "D".



Mrs. Riordan informed petitioner that her child was asleep in one of the rooms. When she told petitioner, in response to his inquiry, that nobody else was home, he retorted that he would kill them if there were others in the house. Petitioner then went upstairs to the second floor (H. 4).

The second intruder took Mrs. Riordan's wallet and attempted to force both women into a hallway closet, but they could not fit. He pushed the women into the bedroom, and examined Mrs. Riordan's jewelry but there was nothing of value. Petitioner entered the bedroom and the women were directed into the closet by the other man who said that no harm would befall them if they would cooperate. After the closet door was closed and secured by a chair placed under the knob, petitioner said to his companion, "I should fuck the bitches". The two men were heard for about ten minutes going through the house (T. 138). Twenty minutes after the intruders appeared to have departed, the women forced their way out of the closet, grabbed the baby and ran into the bar across the street (H. 6).



Prior to petitioner's forcible entry, Mrs. Riordan, who is possessed of excellent vision, looked him straight in the face from a distance of one foot for a period of approximately thirty-five seconds (H. 3-4). She also had a side view of petitioner (H. 13). Her observations of petitioner were made under good lighting conditions of daylight and artificial illumination and she had a clear view of petitioner (H. 3-4, 6). Approximately five minutes elapsed from the initial encounter until the placing of the women in the closet (H. 11). While Mrs. Riordan was frightened during the incident, she was not hysterical (H. 23). Mrs. Arrington had a good look at petitioner, the taller of the two culprits, who was very tall, about 190 to 200 pounds, very dark, with sideburns and a moustache (H. 46-47, 51). His teeth were uneven and not white (H. 52-53), and his face was quite distinctive in appearance (H. 51-52). The first and only time (until the day of her testimony at the Wade hearing) that she saw petitioner was the day of the robbery (H. 49). She described petitioner to the police as tall, ugly and dark (H. 50).



Following their escape from the closet the two women called the police, and gave descriptions of the robbers to them (H. 19). Petitioner was described as being in his late 20's or early 30's, well over six feet tall, with a lean, muscular build, an Afro hairdo, markedly discolored front teeth (which appeared to have been abused and unhealthy), sideburns and the beginnings of a moustache. He was wearing a white open-necked short-sleeved shirt, and khaki-type pants, either blue, gray or brown in color (H. 15-20). Mrs. Riordan recalled that petitioner had "sloe" or drooping eyes (H. 33). Petitioner's companion was described in his late 30's, about five-foot-ten, heavy set, with a small moustache, and wearing a cap and blue jacket (H. 20).

Those descriptions were confirmed as to the general physical appearance of the two perpetrators by Mr. Vincent Grimaldi, the bartender of the bar across the street from the Riordan residence, who observed the men remove several items (including a television set) from the house and load them into a car. In addition, Mr. Grimaldi provided the police with a description of the car used in the robbery, including its license number (H. 16; T. 110-119).



Mrs. Riordan's Pre-Trial Identification of Petitioner

On July 24, 1971, the petitioner was arrested sitting in the car used in the robbery of Mrs. Riordan's home. Between that date and August 10, 1971, Mrs. Riordan was notified that such an arrest had been made. She was told that the man was was arrested fit the general physical description of one of the perpetrators, and that the police were interested in ascertaining whether this individual was involved in the robbery. On August 10, 1971, Mrs. Riordan accompanied Detective John J. Fitzgerald to the Brooklyn Criminal Court at 120 Schermerhorn Street, where the suspect was to appear on the stolen automobile charges (H. 7, 23-26). Although the Detective informed Mrs. Riordan that the suspect's name was Henry Boyd, she did not hear petitioner's name called in court (H. 26-27).

With her attention focused on the front of the courtroom, Mrs. Riordan sat for some twenty minutes as various cases were announced. Between six to eight defendants (all but two of whom were black) were brought into court before petitioner appeared (H. 7). Mrs. Riordan was not briefed about what was to happen and she was unfamiliar with court procedures. She only knew that at some point the



man would appear and if she saw him she was to point him out (H. 27). As the other defendants were brought out, Detective Fitzgerald did not say anything; neither did he say anything when petitioner was brought out (H. 27-28). Upon spotting petitioner, Mrs. Riordan unhesitatingly said, "That's the man." When the detective asked "Which one?" Mrs. Riordan pointed to petitioner who was standing by himself. She knew immediately that this was petitioner -- she had a visceral reaction upon seeing him (H. 8, 28, 35).

The Wade Hearing and Mrs. Arrington's Identification of Petitioner

A Wade hearing was held on March 7-8, 1972. Both Mrs. Riordan and Mrs. Arrington testified. Mrs. Riordan testified to the events of the crime (H. 2-7) and to her identification of petitioner in Criminal Court August 10, 1971 (H. 7-8). She underwent extensive cross-examination by petitioner's attorney (H. 8-40).

Mrs. Riordan stated that she minored in art history in college and described herself as having an excellent visual memory (H. 31). She went to Criminal Court with a completely open mind -- if the perpetrator



had not been there, she would not have identified anyone (H. 32). Detective Fitzgerald had not given Mrs. Riordan a description of petitioner when they went to Criminal Court and she had not seen any photographs of him (H. 33). She could not recall when she was told that petitioner had a prior record (H. 39). Mrs. Riordan had told Mrs. Arrington subsequent to that time that she was certain that petitioner was one of the perpetrators (H. 37).

Prior to Mrs. Arrington's testimony, petitioner requested a lineup since she had never identified him as one of the culprits (H. 40-41). The Court denied the request on the grounds that there was sufficient identification testimony to proceed to trial and that the request was not feasible because of limited personnel. Following the denial of that request, Mrs. Arrington was called to testify. Petitioner's attorney did not object to Mrs. Arrington's taking the witness stand on relevancy grounds; indeed, he took advantage of her presence to engage in an extensive cross-examination of her (H. 47-56).

Mrs. Arrington recounted the events of the crime, including her opportunity to view the petitioner (H. 44-47).



She had not been persuaded to say anything at the hearing. She immediately recognized petitioner as soon as she walked into the courtroom (H. 55). Mrs. Arrington's identification of petitioner was immediate, certain and unequivocal (H. 46, 48, 49, 50, 51, 52, 55).

Detective Fitzgerald had told her that the police had found a man in the getaway car. However, he had not said whether this man fit the description of the perpetrator and had indicated that he could not be certain that this was the man who had committed the crime (H. 53-54). Mrs. Arrington did not see the perpetrator among the photographs which she had previously viewed at the police station (H. 55).

Detective John J. Fitzgerald testified that he responded to the robbery and was given descriptions of both perpetrators by Mrs. Riordan. The taller man was in his late 20's, 6'2" to 6'4", "huge", black skinned, with long sideburns, very ugly, with discolored teeth and wearing a white shirt, dark pants and carrying a silver gun (H. 59). Mrs. Arrington described the man as a very big Negro, about six feet, very dark and in his late twenties (H. 60).

Detective Fitzgerald received notification that petitioner and a woman were arrested in the automobile used in the robbery. Petitioner was described in the message as a 32 year-old male Negro, 6'4", 200 pounds, dark skinned, with a square face, missing front tooth and discolored front teeth (H. 61-62). The detective informed Mrs. Riordan that he possibly had found one of the culprits, that the man fit the description and had discolored teeth. He was not certain whether he mentioned petitioner's name prior to the identification (H. 63-64).

He had never spoken to petitioner prior to the identification, had never seen him before, and had no idea what he looked like (H. 65-66, 68-69, 78, 82). The detective did not know who was representing petitioner prior to August 10, 1971; he had not gone to court in connection with petitioner's larceny case (H. 65, 77). Detective Fitzgerald had not made up his mind whether petitioner was involved in the robbery (H. 70). He was unaware of petitioner's record on August 10 (H. 72).

While sitting with Mrs. Riordan in Part AP 1 of Criminal Court (H. 63) awaiting petitioner's appearance, Detective Fitzgerald did not know from which door he would



enter. In addition, he did not know in advance how the petitioners would be coming out, whether singly, or in small groups (H. 70, 72). The detective did not see petitioner as he came through the door. Mrs. Riordan said, "That's him", as she slid down in her seat. He asked, "where?" and she replied, "That one over there. That big one over there. That's the one." He asked, "Are you sure that's him?". She answered, "I'll never forget him" (H. 75). When Mrs. Riordan identified petitioner, he was standing near two other men (H. 76). If Mrs. Riordan had not identified petitioner, the detective would not have arrested him (H. 72, 83).

#### The Determination of the State Court after the Wade Hearing

At the conclusion of the Wade hearing, petitioner moved to suppress the pre-trial identification of him by Mrs. Riordan in the Criminal Court, and by Mrs. Arrington the previous day in the Wade hearing itself (H. 88). The Court specifically denied the motions with respect to both witnesses (H. 91).



The Court specifically found that Mrs. Riordan did not know who was being brought into the courtroom, but the moment she spotted petitioner, she immediately recognized him (H. 91). Further, the court found that the detective did not make any suggestions to Mrs. Riordan to assist her in making the identification (H. 95-96) and explicitly stated, "I don't see any suggestibility at any stage of this case. Not at all" (H. 96). In addition, the Court found that Mrs. Riordan had ample opportunity to observe petitioner during the commission of the crime and her identification was very good in every detail (H. 94-95). The Court concluded that the identification procedure was proper and did not violate any of petitioner's constitutional rights (H. 91). Moreover, the Court found that since Mrs. Riordan had sufficient opportunity to observe petitioner at the time of the crime, her identification testimony was also admissible because of its independent source (H. 94-95).

#### The Trial

At the trial commencing May 8, 1972, Mrs. Riordan reiterated her testimony at the hearing and described in greater detail her educational background in visual



identification of art objects (T. 27).<sup>\*</sup> She stated she saw petitioner's face for several minutes on the day of the crime (T. 45). Since then, petitioner's appearance had changed, as he sported a beard and a full moustache at the time of trial. His teeth were somewhat cleaner, but were still markedly discolored and crooked (T. 52-54).

Mrs. Arrington reiterated her testimony at the hearing and added that the taller of the two perpetrators was armed with a gun (T. 127, 171). She viewed petitioner for about five minutes while the crime was in progress -- he was very ugly, dark and his teeth were unclean (T. 140, 142, 159). Before petitioner went upstairs, he was told that there was nobody else at home. Petitioner warned the women that if anyone else was in the house "I will blow your God damn brains out" (T. 128-129).

Other prosecution witnesses at trial included Detective Fitzgerald; Mr. Grimaldi, the bartender; Officer Lazzarino, who responded to the scene of the robbery; and Officer Woike, who arrested petitioner in the stolen automobile used in the robbery. Petitioner did not take the

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\* "T" refers to minutes of trial which have been submitted to this Court as an exhibit.



the stand; his defense was simply to display his teeth to the jury (T. 250). The jury found the petitioner guilty of robbery in the first degree, grand larceny in the third degree and burglary in the second degree (T. 374-75). Petitioner is currently incarcerated in the Auburn Correctional Facility on an indeterminate prison sentence of up to ten years. His state remedies have been exhausted as to the points raised in the petition.

#### POINT I

THE FINDINGS OF THE STATE COURT  
JUDGE AT THE WADE HEARING THAT  
THE PRE-TRIAL IDENTIFICATIONS  
BY MRS. RIORDAN AND MRS. ARRINGTON  
DID NOT VIOLATE PETITIONER'S CON-  
STITUTIONAL RIGHTS ARE ENTITLED  
TO THE PRESUMPTION OF CORRECTNESS  
CONFERRED BY 28 U.S.C. § 2254(d)

The authority of a federal court exercising habeas corpus review of a state detention is narrow. Donnelly v. DeChristoforo, 416 U.S. 637 (1974). In order for a federal habeas corpus court to overturn a state court conviction, the petitioner must show not merely that a challenged action



of the state courts was "undesirable, erroneous, or even 'universally condemned', but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." Cupp v. Naughton, 414 U.S. 141, 146 (1973). A state conviction may be overturned only upon a finding of "egregious misconduct held. . .to amount to a denial of constitutional due process." Donnelly v. DeChristoforo, supra at 647-48.

In particular, in a petition like this, which seeks to challenge a determination by the state court after a hearing on the merits of a factual issue, federal habeas corpus review is limited by the terms of 28 U.S.C. § 2254(d). This section confers upon state court factual findings, predicated upon the application of proper legal standards, a presumption of correctness, which may be rebutted only upon a showing by the petitioner that those findings are "not fairly supported by the record". 28 U.S.C. § 2254(d)(8). Justice Abrams of the State Supreme Court found at the conclusion of the petitioner's Wade hearing as a matter of fact, that the pre-trial identifications by both Mrs. Riordan and Mrs. Arrington were not in any way produced by any suggestibility in the actions of the police and prosecutor



at any stage of the case (H. 91, 95-96). He then found that the pre-trial identifications of petitioner by Mrs. Arrington and Mrs. Riordan were not conducted in a manner violative of petitioner's constitutional rights (H. 91). The findings of the state court at the Wade hearing are entitled to the weight of presumption conferred by 28 U.S.C. § 2254(d). See LaVallee v. Delle Rose, 410 U.S. 690 (1973); United States ex rel. Pella v. Reed, 527 F. 2d 380, 384 (2d Cir. 1975); United States ex rel. Williams v. LaVallee, 487 F. 2d 1006, 1010 (2d Cir. 1973) cert. den. 416 U.S. 916 (1974); United States ex rel. Phipps v. Follette, 428 F. 2d 912, 914 (2d Cir.), cert. den. 400 U.S. 908 (1970); United States ex rel. John v. Casscles, 489 F. 2d 20, 25 (2d Cir. 1973), cert. den. 416 U.S. 959 (1974). Also see United States ex rel. Millard v. LaVallee, 436 F. 2d 875 (2d Cir. 1970), cert. den. 402 U.S. 914 (1971).

Petitioner, however, both in the District Court and in this appeal, has refused to acknowledge the applicability of 28 U.S.C. § 2254(d). Petitioner claims to be challenging not the factual findings of the state court, but rather the "constitutional significance" (Petitioner's Brief at 13, n. 8) of those facts. This contention is specious.



Virtually very factual determination at a pre-trial hearing -- be it as to the voluntariness of a confession, the existence of probable cause for a search, or, as here, the suggestibility of identification procedures and the existence of an independent source for identification at trial -- requires an ultimate factual finding as to the constitutional significance of the facts shown. That is the purpose of the hearing - to determine whether or not a defendant's constitutional rights have been violated. It is exactly those determinations which § 2254(d) confers with the presumption of correctness. Since there is no question here that Justice Abrams applied the correct legal standards (see H. 85-95), his finding of no suggestibility in the actions of the police and the prosecutor is presumptively correct. No doubt petitioner would like to relitigate those factual questions, but he may not.\*

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\* The footnote in Neil v. Biggers, 409 U.S. 188, 193, n. 3, cited by petitioner in support of his "constitutional significance" argument, actually supports our reliance upon § 2254(d) here, since it emphasized that state court findings were to be given deference even as against lower federal court factual findings. Clearly Justice Abrams' findings of lack of suggestibility were findings of fact, not conclusions of law.



It is for this reason that much of petitioner's focus on the various practices of the police and the District Attorney here is misdirected. This Court on habeas review must limit itself to the question of whether the record in the Wade hearing fairly supports Justice Abrams' findings. Policy questions concerning the desirability of line-ups versus show-ups and the use of courtroom show-ups do not enter into the federal court's exercise of its limited habeas review powers.

#### POINT II

THE RECORD FAIRLY SUPPORTS THE  
STATE COURT JUDGE'S FINDINGS  
THAT THE PRE-TRIAL IDENTIFICA-  
TIONS BY BOTH WITNESSES WERE  
NOT THE RESULT OF IMPERMISSIBLE  
SUGGESTIBILITY, AND IN ANY EVENT  
BOTH WITNESSES HAD A SOUND INDE-  
PENDENT SOURCE FOR THEIR IN-COURT  
IDENTIFICATIONS OF PETITIONER

#### A. Mrs. Arrington

1. Mrs. Arrington's pre-trial confronta-  
tion with petitioner was not imper-  
missibly or unnecessarily suggestive

The pre-trial identification of petitioner by Mrs. Arrington occurred at the Wade hearing, in the presence of petitioner's attorney (as well as the judge). Thus there



is no issue of lack of counsel at this confrontation. See United States v. Cole, 449 F. 2d 194, 200 (8th Cir. 1971), cert. den. 405 U.S. 931 (1972). The question is only whether this confrontation "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [petitioner] was denied due process of Law". Stovall v. Denno, 388 U.S. 293, 302 (1967).

The identification of petitioner by Mrs. Arrington at the Wade hearing was neither "unnecessarily suggestive" nor conducive to "irreparable mistaken identification". Indeed, it was in many respects an exemplary practice, at least in the context of a show-up. Not only was the petitioner represented by counsel, but counsel had an immediate opportunity to cross-examine Mrs. Arrington as to the source, reliability and accuracy of her identification. Moreover, the entire identification process occurred before the very judge called on to make the factual determination concerning those very matters. The judge had the rare opportunity to be present during the identification, to observe the actual act of identification, the surety of the identification and the demeanor of the witness during the identification. The judge could observe the behavior of the police and the prosecutor throughout the identification



process and was in an unparalleled position to find (as he did) a complete absence of any suggestiveness during the entire confrontation.

If a show-up conducted before the very eyes of the hearing judge is not valid, it is difficult to imagine when a show-up could ever be permissible. Yet no court has gone so far as to suggest blanket condemnation of the show-up procedure. See Neil v. Biggers, 409 U.S. 188, 198 (1972). Since, as petitioner concedes, there is no constitutional "right to a lineup", United States v. Estremara, 531 F. 2d 1103, 1111 (2d Cir. 1976), the propriety of the show-up procedure cannot be challenged.\*

\* While petitioner did request a lineup, upon the judge's denial of that request, he never actually objected to Mrs. Arrington's testimony as unnecessary nor sought to exclude it on relevancy or any other grounds. Instead, his counsel permitted Mrs. Arrington to take the stand with no objection to relevancy, and took the opportunity to conduct a thorough cross-examination of her, allowing him to develop possible impeaching material for the petitioner's trial. In these circumstances, when petitioner chose to undertake a knowing waiver of his objection to Mrs. Arrington's testimony as part of his trial strategy, he should now be barred from reversing that decision. Fay v. Noia, 372 U.S. 391 (1963); United States ex rel. Terry v. Henderson, 462 F. 2d 1125, 1128 (2d Cir. 1972).



No federal court has ever reversed a conviction on direct appeal (let alone on habeas corpus review) due to improper pre-trial identification made formally under oath in a courtroom.\* Petitioner has not pointed out even one case in which such a confrontation was found to be "unnecessarily suggestive and conducive to irreparable mistaken identification", the tests laid down in Stovall v. Denno, supra.

The pre-trial courtroom identification procedure has in fact been upheld in every circumstance in which it has occurred. In Baker v. Hocker, 496 F. 2d 615 (9th Cir. 1974), the complainant selected two of the three robbers out of a lineup but failed to identify the defendant, who was also standing in the lineup. Subsequently, at the preliminary hearing, the complainant identified the defendant as he sat in court alongside the two persons whom the witness had previously selected. In rejecting

\* Even at the state level the only legal support that petitioner cites in his brief is a dissenting opinion from a decision by the Appellate Division, Second Department. See People v. Jose Ramos, 52 A D 2d 640 (2d Dept. 1976) (appeal pending).



the defendant's claim that the confrontation at the hearing was unduly suggestive, the court stated:

"Undoubtedly any in-court identification confrontation, whether at a preliminary hearing or at trial, whether the defendant is tried alone or with others, carries with it the stigma of the inevitable suggestion that the state thinks the defendant has committed the crime. Perhaps in appellant's case the suggestion was compounded by the presence of the two previously identified men. But more than suggestion is required for a due process violation - the procedure must create 'unnecessary' or 'impermissible' suggestion." Id. at 617.

In United States ex rel. Riffert v. Rundle, 464 F. 2d 1348 (3d Cir. 1972), cert. den. 415 U.S. 927 (1974), the Court held that a courtroom identification of a defendant by a witness at a preliminary hearing is proper where such identification is limited within the formal context of the proceeding. As in the instant case, defense counsel there was present "and was therefore able to cross-examine the witnesses both at the hearing and the trial as to any weaknesses in their identification". Id. at 1351.



In United States v. Kaylor, 491 F. 2d 1127 (2d Cir. 1973), mod. on other grounds, 491 F. 2d 1133 (1973), vacated on other grounds sub nom. United States v. Hopkins, 418 U.S. 909 (1974), a witness at trial took the stand to testify as to matters other than the defendant's identification, left the stand, informed the prosecutor of his ability to identify the defendant as the perpetrator based on his courtroom view of him, and retook the stand to make the formal identification. Based on the trial court's finding that "the witness was 'forthright' and his testimony positive," Id. at 1132, this Court upheld the identification procedure. Similarly, the Wade hearing judge in this case approved Mrs. Arrington's courtroom identification\* and the jury at trial certainly had a full and fair

\* Justice Abrams' findings in regard to Mrs. Arrington's identification at the Wade hearing, while somewhat abbreviated, are sufficient, since an absence of explicit findings by a state court judge does not necessitate an evidentiary hearing by the federal habeas corpus court, United States ex rel. Hayward v. Johnson, 508 F. 2d 322 (3d Cir. 1975), and those findings must be presumed as properly founded. LaVallee v. Delle Rose, supra.



opportunity to make the same judgments after Mrs. Arrington's testimony at that time. Clearly, her courtroom identification underwent full scrutiny, and just as clearly met with approval. This Court has been shown no sufficient reason to set aside that result.

In Haberstroh v. Montayne, 362 F. Supp. 838 (W.D.N.Y. 1973), affd. on other grounds, 493 F. 2d 483 (2d Cir. 1974), the Court approved a pre-trial courtroom identification held three and one-half months after the crime, since the confrontation was "conducted as part of a judicial proceeding at which petitioner was represented by counsel." Haberstroh, supra, 362 F. Supp. at 840. Also see Smith v. Paderick, 519 F. 2d 70 (4th Cir.), cert. den. 423 U.S. 935 (1975); United States v. Johnson, 461 F. 2d 1165 (5th Cir. 1972); United States v. Wilkerson, 456 F. 2d 57 (6th Cir.), cert. den. 408 U.S. 926 (1972); United States v. Smith, 473 F. 2d 1148 (D.C. Cir. 1972); United States v. Hardy, 451 F. 2d 905 (3d Cir. 1971); United States v. Cole, supra; Pettett v. United States, 434 F. 2d 105 (6th Cir. 1970); United States v. Black, 412 F. 2d 687 (6th Cir. 1969), cert. den. 396 U.S. 1018 (1970).



In addition to receiving judicial approval, the Wade hearing judge's findings concerning Mrs. Arrington's pre-trial identification of petitioner are amply supported by the record. Mrs. Arrington testified on cross-examination that the detective on the case had never given her the description the man arrested in the robbery car (H. 59), so no suggestibility arose there. Mrs. Arrington further affirmatively stated that no one had sought to persuade her to make a favorable identification (H. 48, 55). She showed immediate and unequivocal recognition of petitioner, evidencing a residue of emotional reaction to the crime itself (H. 49, 51, 52, 53, 56). Try as petitioner's hearing counsel did, he was unable on cross-examination to adduce even a hint of influence by police or prosecutor in Mrs. Arrington's identification of petitioner, see United States ex rel. John v. Casscles, supra at 26, and Justice Abrams' findings confirm the origins of her identification. Thus, petitioner has failed to come forward with sufficient grounds to overcome the presumption of correctness accorded those findings by 28 U.S.C. § 2254(d).



2. Mrs. Arrington's view of petitioner during the robbery provided a sound independent basis for her identification of him at trial

Assuming arguendo that there was some suggestibility as to Mrs. Arrington's pre-trial identification, it is plain that Mrs. Arrington's identification of petitioner at trial is grounded on a sound independent basis -- her view of the petitioner at the time of the crime -- and was entirely proper.

The Supreme Court of the United States has set forth the following factors to be considered in determining if an in-court identification is reliable even though the pre-trial confrontation procedure was improperly suggestive:

"the opportunity of the witness to view of the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and confrontation".

Neil v. Biggers, 409 U.S. 188, 199-200 (1972).



Mrs. Arrington's opportunity to view petitioner was certainly adequate. Her testimony of a five minute viewing period of the petitioner, even if somewhat overstated, only emphasizes the intensity of her experience in observing the man robbing her at gunpoint. And of course, even a much shorter time is sufficient for petitioner's "image to become indelibly seared in [her] memory. [A] 20 to 30 second observation, is much more than a fleeting glance, as anyone who watches the second hand of a clock sweep by for that period can attest". United States ex rel. Phipps v. Follette, supra at 916. See United States ex rel. Cummings v. Zelker, 455 F. 2d 714, 715 (2d Cir. 1972) (15 second view sufficient); United States v. Yanishevsky, 500 F. 2d 1327, 1330 (2d Cir. 1974) (a "side view" adequate); Mysholowsky v. People of the State of New York, 535 F. 2d 194, 197 (2d Cir. 1976) (45 second view sufficient). At the very least, Mrs. Arrington had a time period in that range to observe petitioner, possibly longer.

Furthermore, as a victim of the crime, her attention was certainly riveted upon the robbers, especially, as she testified, upon petitioner, who was visibly holding a pistol. See Phipps, supra at 915. Since petitioner was the leader



and the more threatening of the two robbers, it is quite natural that Mrs. Arrington's attention should focus on him rather than his less dangerous partner.

Mrs. Arrington's prior descriptions of petitioner "might not have satisfied Proust", Neil v. Biggers, supra at 200, but were nonetheless accurate and reasonably precise. Her initial silent assent to Mrs. Riordan's thorough description of petitioner by no means indicates a lack of detail in her observation. She merely found the other description satisfactory. At the Wade hearing, she recalled petitioner's height, though he was sitting throughout the proceeding (H. 51), and remembered his crooked, discolored teeth (H. 52). She also vividly recalled the unattractiveness of his physical appearance (H. 51).\*

The level of certainty demonstrated by the witness at the trial in her identification of petitioner was extremely high, as it was at the Wade hearing. At trial she initially spotted petitioner immediately (T. 126), and

\* Compare her statement "It's a face you can't change, unless you put on a mask" (H. 51) with the witness' statement in Biggers, "I don't think I could ever forget [his face]", Biggers, supra at 201.



and under thorough cross-examination reaffirmed her description of him (T. 140). Mrs. Arrington's testimony must be weighed as that of an average person with average powers of observation and description. Under those standards her identification of petitioner is unassailable. The lapse of 10 1/2 months between the robbery and the trial did nothing to lessen the validity of that identification, since she easily met each of the other relevant tests of Neil v. Biggers, supra.

In the "totality of the circumstances" presented in this case, Stovall v. Denno, supra at 302, it is clear that Mrs. Arrington's identification of petitioner at trial as the man who robbed her at gunpoint was the result of that terrible experience itself, and had nothing whatever to do with her appearance some weeks earlier at the Wade hearing. Petitioner's speculation and surmise to the contrary can do nothing to alter that conclusion. The jury, which had the circumstances of the Wade hearing fully presented to it, and could itself weigh the suggestiveness of that



confrontation, found petitioner guilty after a fair trial. Nothing brought forward by the petitioner here can justify overturning that verdict.\*

In any event, any infirmities as to Mrs. Arrington's identification at trial would constitute harmless error beyond a reasonable doubt, in light of Mrs. Riordan's certain, immediate and convincing identification of petitioner at trial and in light of the circumstantial evidence linking petitioner to the stolen car used in the robbery. See Chapman v. California, 386 U.S. 18 (1967); Harrington v. California, 395 U.S. 250 (1969).

B. Mrs. Riordan

1. Mrs. Riordan's pre-trial identification of petitioner was proper

At the conclusion of the petitioner's Wade hearing Justice Abrams made extensive and specific findings of fact with respect to the identification of petitioner by Mrs. Riordan, finding that the identification was tantamount

\* It should be noted that Mrs. Arrington did not mention her pre-trial identification on her direct testimony at trial, but only on cross-examination. Thus the existence of the sound independent basis for her in-court identification is sufficient to deny the petition here, whether or not the pre-trial identification was improper. See Braithwaite v. Manson, 527 F. 2d 363, 369 (2d Cir. 1975), cert. granted 425 U.S. 957 (1976); United States v. Evans, 484 F. 2d 1178, 1186 n. 8 (2d Cir. 1973).



to or even better than a lineup (H. 91), that there was no suggestibility at any stage of the case (H. 96) and that no violation of petitioner's constitutional rights had occurred (H. 91). These findings must be upheld unless lacking support in the record, 28 U.S.C. § 2254(d)(8), and the record in fact amply supports those findings. See LaVallee v. Delle Rose, supra.

Mrs. Riordan's pre-trial identification of petitioner occurred less than seven weeks after the robbery. At no time prior to the identification did the police either show photographs or give a description of petitioner to Mrs. Riordan. Moreover, none of the information conveyed to her tended to focus her attention on petitioner. While she was told that someone would come into the courtroom who would fit the description she had given, she had described two perpetrators and there is no indication in Mrs. Riordan's hearing testimony that she was informed as to which one of the two culprits she was looking for. Even if she had been made aware that the potential suspect had discolored teeth, which she denied, it is highly improbable that her instant recognition of petitioner would have been based on this feature, since she identified him from a considerable distance at the Criminal Court, before the color of his teeth could have been apparent.



None of the additional facts communicated to Mrs. Riordan (that the suspect had been arrested in the stolen vehicle used in the robbery, that he would appear in court on that charge and, perhaps, that he had a criminal record)\* could have facilitated her selection of petitioner from the other black defendants present in the courtroom. It is difficult to perceive how such information can be said to have focused Mrs. Riordan's attention upon petitioner.

Inside the courtroom, petitioner was one of at least four to six black defendants present (as well as two Puerto Ricans). It is noteworthy that Mrs. Riordan was unaware of when or where petitioner would appear, and that she sat for some twenty minutes before petitioner actually emerged. While Mrs. Riordan may have been apprised of petitioner's name, she did not hear his name called in court. Moreover, since Detective Fitzgerald had never met petitioner and did not even know what he looked like, it would have been impossible for him to have signalled to

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\* Mrs. Riordan could not recall at the hearing whether she had been told that petitioner had a prior record. Detective Fitzgerald stated that he couldn't have informed her about petitioner's record prior to the confrontation, because he was not that familiar with petitioner's record (E. 72).



Mrs. Riordan to select petitioner. This is supported by the testimony that Mrs. Riordan recognized petitioner immediately and that the detective then inquired as to petitioner's location in the room (H. 74). Mrs. Riordan pointed out petitioner and stated that she would never forget him (H. 74).

Petitioner argues that his height so distinguished him from the other black defendants in the courtroom that his identification may have resulted from this single suggestive circumstance. Yet petitioner's sole support for this argument is Mrs. Riordan's statement at trial that petitioner was the tallest of the various defendants she viewed in the Criminal Court. She did not testify that he was so much taller than the other individuals as to make him conspicuous, only that he was the tallest. This one fact alone can hardly establish that the confrontation was unfairly structured to lead to petitioner's identification. Even less can this fact be attributed to any evil design by the police, since Detective Fitzgerald could hardly have had any advance knowledge as to the heights of the various defendants who would be appearing in Criminal Court that particular morning.\*

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\* If Mrs. Riordan did not testify at the Wade hearing as to the height of the various defendants in the Criminal Court, it is because petitioner's attorney neglected to cross-examine her as to that matter. It is simply implausible that this one fact could have had any effect whatever on Justice Abrams' ultimate finding.



Petitioner further argues that the confrontation was impermissibly suggestive because Mrs. Riordan knew she was looking for someone who matched her description of one of the two robbers, and would therefore somehow feel compelled to pick someone out. Yet every identification procedure, including the lineup, is predicated on the presumption that the police consider one of the individuals being viewed as a possible criminal suspect. See Saltys v. Adams, 465 F. 2d 1023, 1030 (2d Cir. 1972) (Friendly, J., dissenting). Otherwise no confrontation would be arranged in the first place. After all, Mrs. Riordan couldn't have thought she was being asked to go to Criminal Court to expand her philosophical awareness of the criminal justice system -- she was going to try to identify one of the men who robbed her at gunpoint. But there is no reason why this fact would influence her to pick out an innocent man or anyone other than the two men who actually did rob her. Petitioner has never disputed that Mrs. Riordan was a completely honest witness, and we are given no reason why Mrs. Riordan would pick out an innocent stranger as the



robber. Nor can petitioner explain away the visceral emotional reaction which Mrs. Riordan experienced immediately upon spotting petitioner in the courthouse.

Thus, it is clear that the record of the Wade hearing does fully support the judge's findings, and that the confrontation was in no way suggestive.

The informal courtroom confrontation has been approved in almost all the instances in which it has come under judicial scrutiny by the Courts of Appeals. In United States v. Scott, 518 F. 2d 261 (6th Cir. 1975), FBI agents brought two witnesses to the defendant's arraignment and there were only a few other defendants present in the courtroom. The identifications made there were upheld. "In light of the fairness exhibited by the participating federal agent and in view of the positive identifications by the witnesses at the hearing and at trial, we conclude that the defendant was not denied due process by use of arraignment confrontation". Id. at 266-67. In Pettett v. United States, 434 F. 2d 105 (6th Cir. 1970), the Court approved informal arraignment confrontation by four witnesses as being "neither suggestive nor calculated to result in mistaken



identification." Id. at 109. Accord: United States v. Black, 412 F. 2d 687 (6th Cir. 1969), cert. den. 396 U.S. 1018 (1970). Also see United States v. Wilkerson, 456 F. 2d 57 (6th Cir.), cert. den. 408 U.S. 926 (1972).

In United States v. Lipowitz, 407 F. 2d 597 (3d Cir.), cert. den. sub nom. Smith v. United States, 395 U.S. 946 (1969), two witnesses were brought into the courtroom for identification of the defendant during his arraignment, which occurred amid various other proceedings in the same time period. Upon examining the totality of evidence on the issue of identification, the Court approved the identification as not violative of due process. Id. at 599. Accord: United States v. Schartner, 426 F. 2d 470 (3d Cir. 1970).

Both Sanchell v. Parratt, 530 F. 2d 286 (8th Cir. 1976) and United States v. Luck, 447 F. 2d 1333 (6th Cir. 1971), the two cases in which informal courtroom identification have been disapproved, involve circumstances vastly different than those present here. In Sanchell, five rape or robbery victim witnesses who previously had failed to pick the defendant out of a fair photographic array watched him at two pre-trial proceedings; two of the five then



changed their minds and were able to identify the defendant, and a third identified him by his voice. Sanchell, supra at 289-92. In Luck eleven witnesses observed the defendant at his arraignment; at a suppression hearing none could identify him, but at trial one witness changed her testimony. Luck, supra at 1334-35. Both cases involved informal confrontations clearly spotlighting the defendant as the suspect, and revolved on changes in testimony following the confrontation by witnesses who previously had been unable to identify the defendant through other procedures. There was no such "spotlighting" here, and no such change in testimony -- Mrs. Riordan picked the petitioner out of a number of defendants present in court, and her identification of him remained immediate and certain throughout.

2. Mrs. Riordan had a sound independent source for her in-court identification of petitioner

In any event, Mrs. Riordan plainly had a very reliable independent source for her identification of the petitioner at trial -- her original view of him during the crime, which led to the remarkably detailed and accurate description of petitioner given to the police immediately after the crime (T. 46-47). Under the tests laid down in



Neil v. Biggers, supra, in the totality of the circumstances Mrs. Riordan's courtroom identification of petitioner easily passes muster. Her opportunity to view the petitioner during the crime was good, United States ex rel. Phipps v. Follette, supra; her degree of attention very high, as the victim of the crime; her prior description extremely accurate; her identification of petitioner at trial certain and unswerving (Mrs. Riordan in fact had academic training as an art historian with substantial experience in visual identification and recollection);\* and the 10 1/2 month time between the crime and the trial insignificant in view of the overwhelming force of all the other factors considered above. See United States ex rel. Lucas v. Regan, 503 F. 2d 1, 4 (2d Cir. 1974), cert. den. 420 U.S. 939 (1975); United States v. Mims, 481 F. 2d 636 (2d Cir. 1973); United States ex rel. Rutherford v. Deegan, 406 F. 2d 217 (2d Cir.), cert. den. 395 U.S. 983 (1969).

\* See Braithwaite v. Manson, 527 F. 2d 363, 371 (2d Cir. 1975), cert. granted 425 U.S. 957 (1976), noting that "certainty of identification" by an ordinary citizen is to be highly credited.



Petitioner erroneously contends that Braithwaite v. Manson, supra, would require a new trial if Mrs. Riordan's pre-trial confrontation with petitioner were found impermissibly suggestive, because she briefly alluded to that confrontation in her direct testimony at trial (T. 55-56). Yet Braithwaite is inapplicable for several reasons. First, Mrs. Riordan's testimony on direct examination as to that confrontation was so minimal and obtuse as to have almost no impact on the jury. It was petitioner's own attorney on cross-examination who drew out the description of that confrontation in great detail (T. 67-77, 82-84). Petitioner surely should not be rewarded now on habeas review for any improper influence upon the jury caused by his own protracted exploration of the pre-trial identification he now seeks to suppress. See Braithwaite at 369, United States v. Evans, supra at 1186 n. 8.

Secondly, Mrs. Riordan's certain and immediate in-court identification of petitioner, as the testimony of an ordinary citizen, contrasts sharply with the testimony of the undercover police officer in Braithwaite, whom the Court there believed had made dozens of intervening in-court



identifications. See Braithwaite, supra at 371-72. Her in-court testimony is to be credited highly, and the brief mention of the earlier identification on direct examination was nothing more than harmless error.

Finally, in this case, unlike Braithwaite, a Wade hearing was held and Mrs. Riordan's pre-trial identification specifically upheld. (In Braithwaite by contrast there had been no suppression hearing of the photographic identification, and on habeas review the respondent apparently admitted that it had been unconstitutional. Braithwaite, supra at 366). In the instant case the prosecutor at trial was entitled to rely on the Wade hearing determination and to question the witness as to the pre-trial identification -- otherwise the Wade hearing would be pointless. Where, as here, the Wade hearing decision was upheld on appeal, there seems little value to apply an exclusionary rule on habeas review if that decision is overturned, in relation to the "costs to other values vital to a rational system of criminal justice." Stone v. Powell, 44 U.S.L.W. 5313, 5321 (U.S. July 6, 1976). There would be little rationality indeed to rejecting an identification made 8 1/2 months after the crime and remitting the State to a new trial



requiring an identification almost six years after the crime. In this precise, narrow context an exclusionary rule is inappropriate.

It must be stressed that the applicability of Braithwaite v. Manson and the propriety of an exclusionary rule in this case must be reached only if Mrs. Riordan's pre-trial confrontation is found to be unconstitutional. Because the respondent firmly believes that this confrontation was in no way impermissibly suggestive, it is submitted that these questions need not be decided in this case.

The idea that Detective Fitzgerald somehow influenced Mrs. Riordan in the Criminal Court to pick out petitioner as the robber, in addition to having been categorically rejected by the Wade hearing judge, is quite far fetched. After all, Detective Fitzgerald had never seen the petitioner prior to that time, and was relying on the description provided by Mrs. Riordan. The manner in which he could have influenced her to pick out petitioner from among the numerous defendants present in court that morning is difficult to grasp. Since he did not know what petitioner looked like himself (H. 82), it would be an



accomplishment of some skill for him to have influenced her identification of petitioner, which was instantaneous and visceral (H. 75).

Thus, the pre-trial identification of petitioner by Mrs. Riordan can provide no basis whatever for the granting of a writ of habeas corpus in this case.

### POINT III

PETITIONER WAS NOT ENTITLED TO COUNSEL AT THE PRE-INDICTMENT IDENTIFICATION BY MRS. RIORDAN AND IN ANY EVENT, IN VIEW OF THE SOUND INDEPENDENT BASIS FOR MRS. RIORDAN'S IDENTIFICATION OF HIM AT TRIAL, ANY ERROR IN THAT SITUATION WAS HARMLESS BEYOND A REASONABLE DOUBT.

In Kirby v. Illinois, 406 U.S. 682 (1972), the Supreme Court held that the constitutional right to counsel for a criminal defendant does not attach until after the initiation of formal adversary proceedings. In the within case, at the time Mrs. Riordan identified petitioner in Criminal Court, no accusatory instrument had been filed against him in relation to the charges for which the identification was sought and for which he has been convicted,



so he had no right to counsel at that time in relation to that identification. The charges for which he was at that time under arrest, relating to the stolen automobile, were unrelated to the robbery. Nevertheless, petitioner claims to have been entitled to counsel during the pre-trial confrontation with Mrs. Riordan.

Petitioner's right-to-counsel claim seeks an extension of Sixth Amendment rights directly in contravention of Kirby. This claim was considered in Sanchell v. Parratt, supra (a case otherwise well-regarded by petitioner) and categorically rejected. In that case the Eighth Circuit held:

"[U]nder Kirby only those identification confrontations which occur after the defendant has been formally charged with the offense for which the identification testimony is sought require presence of counsel". Sanchell, supra at 290, n. 2.

In this case, Detective Fitzgerald had no idea whether petitioner had any connection whatever to the Riordan robbery until after the identification of him by Mrs. Riordan. Unlike Saltys v. Adams, 465 F. 2d 1023



(2d Cir. 1972), the case heavily relied on by petitioner,\* there was no evidence whatever linking petitioner to the Riordan robbery until the eyewitness identification. (In Saltys, two eyewitnesses had previously made photographic identifications of the defendant and he was heavily suspect of the crime. Saltys, supra at 1026-27).\*\* Detective Fitzgerald did not even know what petitioner looked like until after the identification. Nor did he know for certain if petitioner was represented by counsel, and if so whom. For all intents and purposes, petitioner was like any other individual for whom police seek pre-indictment identification by an eyewitness. Petitioner thus is no more entitled to counsel at that nascent stage of the pre-indictment process than anyone else, and Kirby makes clear that as a matter of constitutional law no such right exists.

\* Also, see Judge Friendly's dissent in Saltys as to the true rationale for the majority decision and the majority's refusal to give Kirby its fair rearing. Saltys, supra at 1029-31.

\*\* Similarly, in Thomas v. Leeke, 393 F. Supp. 282 (D.S.C. 1975), the police already had "probable cause" to indict the defendant based on other evidence at the time of the challenged confrontation. Id. at 286. Here, the police had virtually no evidence to support an indictment prior to Mrs. Riordan's identification.



The petitioner's robbery charges were in no way related to his automobile charges. Use of an automobile constitutes no element of the robbery, larceny or burglary charges, and the events of the Riordan robbery have no connection to any of his automobile charges. The fact that under some circumstances his later link to the automobile could bear on proof of his participation in the Riordan robbery does not mean that the charges are in any way connected so that indictment on one set required counsel at all critical stages in relation to the other. Certainly, Mrs. Riordan knew nothing that could conceivably relate to the automobile charges, yet until her identification of petitioner, police had no supportable reason to connect petitioner to the Riordan robbery. It certainly could not be said that at the time of the Criminal Court confrontation the State had "committed itself to prosecute" petitioner for the Riordan robbery, Kirby v. Illinois, supra at 689, yet such a formal commitment by the State is necessary to trigger the right to counsel. Ibid. Thus, there is no nexus between the automobile charges and the robbery charges sufficient to require counsel at the Criminal Court confrontation in connection with the latter charges.



In any event, even if, arguendo, there were a constitutional violation in that situation, Mrs. Riordan's independently-based positive and unswerving identification of petitioner at trial would render that error harmless beyond a reasonable doubt. For the reasons set forth in Point II, (B)(2) supra, the pre-trial identification had no effect whatever on Mrs. Riordan's trial identification of petitioner. Thus whatever transpired at the pre-trial confrontation is necessarily irrelevant and harmless beyond a reasonable doubt. Chapman v. California, supra. See United States ex rel. Rutherford v. Deegan, supra.

Further, the Wade hearing judge found specifically that no violation of petitioner's Sixth Amendment rights occurred at the Criminal Court confrontation, and that finding is entitled to the presumption of correctness established by 28 U.S.C. § 2254(d). LaVallee v. Delle Rose, supra.



CONCLUSION

THE ORDER OF THE DISTRICT COURT  
DISMISSING THE PETITION SHOULD  
BE AFFIRMED.

Dated: New York, New York  
February 3, 1977

Respectfully submitted,

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STATE OF NEW YORK )  
 : SS.:  
COUNTY OF NEW YORK )

MARY KO , being duly sworn, deposes and  
says that she is employed in the office of the Attorney  
General of the State of New York, attorney for appellee  
herein. On the 3rd day of February , 1977 , she  
served the annexed upon the following named person :

WILLIAM E. HELLERSTEIN, ESQ.  
Arthur T. Cambouris, of Counsel  
Legal Aid Society - Criminal Appeals Bureau  
15 Park Row - 18th Floor  
New York, New York 10038

Attorney in the within entitled appeal by depositing  
a true and correct copy thereof, properly enclosed in a post-  
paid wrapper, in a post-office box regularly maintained by  
the Government of the United States at Two World Trade Center,  
New York, New York 10047, directed to said Attorney at the  
address within the State designated by him for that purpose.

Mary Ko

Sworn to before me this  
3rd day of February , 1977

Mind White  
Assistant Attorney General  
of the State of New York